Supreme Court, U.S.
FILED

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No. 021823 APR 28 2003

IN THE

Supreme Court of the United States

MICHAEL CROWLEY, et al,

Petitioners,

v.

CLEVELAND BROWN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CLEVELAND BROWN,

Plaintiff,

v.

Case No. 2:98 cv 122
Hon. Robert Holmes Bell

MICHAEL CROWLEY, et al.,

Defendants.

REPORT AND RECOMMENDATION

Plaintiff Cleveland Brown, a prisoner confined within the Michigan Department of Corrections (MDOC) system, filed this lawsuit against a number of MDOC employees. The court initially dismissed as frivolous all plaintiff's claims expect plaintiffs First Amendment freedom of association claims and plaintiffs Eighth Amendment claims regarding the denial of basic hygiene items at the Baraga Maximum Correctional Facility. The court did not construe plaintiff's complaint as asserting a claim for retaliation. The remaining defendants and plaintiff filed motions for summary judgment. Within plaintiff's motion for summary judgment, among other new claims, plaintiff addressed the issue of retaliation. The court *granted* defendants' motion for summary judgment and denied plaintiff's motion for summary judgment. The merits of plaintiff's retaliation claim and other newly asserted claims were addressed in the Report and Recommendation concerning the motions for summary judgment. In the Report and Recommendation the court applied the three elements as stated

in Thaddeus-X v Blatter, 175 F.3d 378 (6th Cir. 1999), to plaintiff's claim of retaliation and concluded:

> In this case, plaintiff fails to allege any specific facts in support of his claim that the misconduct ticket was motivated by retaliatory animus. In his affidavit, which is attached to defendants' motion for summary judgment, defendant Lesatz attests that after plaintiffs complaint was investigated by Internal Affairs and was found to be without merit, he issued a major misconduct report for interference with the administration of rules. There is no indication that the misconduct was motivated by *an* improper desire to retaliate against plaintiff. Therefore, in the opinion of the undersigned, plaintiffs retaliation claim against defendant Lesatz is without merit.

Plaintiff appealed the dismissal of his complaint to the Sixth Circuit. The Sixth Circuit affirmed the dismissal of plaintiffs claims, but has concluded that it was improper for the court to dismiss plaintiffs retaliation claim as "frivolous" under "§ 1915(e)(2)(B)." The Sixth Circuit concluded that the court dismissed plaintiffs retaliation claim as frivolous stating:

> In this case Brown has alleged facts sufficient to assert a viable retaliation claim. Brown alleges that he filed grievances against prison officials, which is protected conduct under the First Amendment. See Noble v Schmitt, 87 F.3d 157, 162 (6th Cir. 1996). Brown also alleges that he was prosecuted by the defendants for "interference with rules," and we believe that an intra-prison prosecution may constitute an adverse action that would deter a person of ordinary firmness from engaging in the protected conduct at issue. Finally, Brown alleges that his protected activity motivated the alleged adverse action taken by the defendants. Because Brown has alleged facts sufficient to withstand a

> dismissal for failure to state a claim, we vacate the district court's judgment on Brown's retaliation claim and remand that claim for further proceedings.

Plaintiffs retaliation claim arises from *an* allegation that money was taken improperly out of his prison account. Plaintiff filed grievances on the issue, and then sent a letter to the State Police who informed Internal Affairs at the Michigan Department of Corrections. An investigation revealed that plaintiff's claim was baseless. A memorandum written by Janice Ansell, administrative assistant at AMF, stated in part:

> Toni Joki in prisoner accounting states that on January 8, 1998 we received a debit memo from Ryan Correctional Facility requesting that we collect debts from prisoner Brown #167009 in the amount of $51.24.
>
> Prisoner Brown did contact Ms. Joki with his claim that he had already made payments as to this debt. She informed him that he would have to contact MBP as she did not have access to MBP. . .records for 1995-96. However, she made several attempts to clear the matter by contacting MBP herself. . . .
>
> Payments from Brown's account were made in January and February 1997 totaling $28.53 leaving a balance of $22.71. AMF has collected $416.55 toward this debt so he now owes $6.16. When that amount is collected, the debt. . .will have been paid.

March 25, 1998, memorandum attached as exhibit I to defendants' January 1, 1999, motion for summary judgment, Docket #24.

As a result of the investigation, Regional Prison Administrator Richard Johnson wrote a memorandum to Warden Mike Crowley, which stated:

> Prisoner Brown, #167009 alleges that AMF staff in prisoner accounting are embezzling funds from his account. This allegation has been investigated by Internal Affairs and found to be without merit.
>
> We have been seeing more and more of these false complaints lately. While I believe a prisoner should be able to file a legitimate complaint, they also should be punished for filing false complaints. Therefore, please issue a major misconduct ticket to the prisoner regarding this matter.

A misconduct was written by AMF Case Manager Daniel Lesatz, for interference with the administration of rules. The misconduct explains that an investigation was undertaken and it was determined that, contrary to plaintiffs claim, he had an outstanding debt that needed to be paid. The misconduct was dismissed after a hearing. The hearing officer concluded that the evidence was insufficient to show that plaintiff deliberately filed false allegations with the specific intent to have a staff member disciplined. The hearing officer further stated that it was not unreasonable for plaintiff to believe that he had paid in full his debt. Further, based on the document that plaintiff provided during the hearing, the hearing officer concluded that it was reasonable and probable that plaintiff thought that he had a legitimate claim that someone was improperly taking money from his account.

Defendants argue that the matter should be dismissed because plaintiff failed to exhaust his administrative grievance remedies on his retaliation issue prior to initiating this action. Pursuant to 42 U.S.C. § 1997e(a), a prisoner bringing an action with respect to prison conditions under 42 U.S.C. § 1983 must exhaust available administrative remedies. A district court must enforce the exhaustion requirement. Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir.), cert. denied, 525 U.S. 833 (1998); accord Wyatt v. Leonard, 193 F.3d 876, 879 (6th Cir. 1999). A

prisoner must exhaust available administrative remedies, even if the prisoner may not be able to obtain the specific type of relief he seeks in the state administrative process. See Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir.), cert. denied, 121 S. Ct. 634 (2000); Hartsfield v. Vidor, 199 F.3d 305, 308 (6th Cir. 1999); Wyatt, 193 F.3d at 878-79; Freeman v. Francis, 196 F.3d 641, 643 (6th Cir. 1999).

The exhaustion requirement applies to all cases filed on or after April 26, 1996, but does not apply when the "ability to exhaust for the event that gave rise to the action expired before enactment of the [PLRA]." Wyatt, 193 F.3d at 879 (citing Bibbs v. Zummer, No. 97-2112, 1999 WL 68573, at *2 (6th Cir. Jan. 21, 1999)); see also Lavista v. Peeler, 195 F.3d 254, 258 (6th Cir. 1999) (federal prisoner) ("If the time to bring that claim under the Bureau of Prisons regulations expired before passage of the Reform Act in April 1996, plaintiff need not exhaust administrative remedies as to that claim."); Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999) ("This is not a case where the event giving rise to the claim occurred before passage of the Act, thereby raising question about whether it is fair to require the prisoner to know that administrative remedies must be exhausted before filing a complaint in federal court). Because plaintiff's action was filed after the enactment of the PLRA and because plaintiff's ability to exhaust his claims did not expire before enactment of the PLRA, the court finds that the exhaustion requirement applies to his action.

A prisoner must allege and show that he has exhausted all available state remedies and should attach to his § 1983 complaint the administrative decision disposing of his complaint, if the decision is available. Brown, 139 F.3d at 1104. In the absence of written documentation, the prisoner must describe with specificity the administrative proceeding and its outcome. Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir.), cert. denied, 121 S. Ct. 634 (2000). A prisoner must

make particularized averments to allow for the district court to determine what, if any, claims have been exhausted or what has been done in an attempt to exhaust the claims. *Id.*

A plaintiff must pursue all levels of the administrative procedure before filing an action in federal court. See Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999) ("While we recognize that plaintiff made some attempt to go through the prison's grievance procedures, we must dismiss plaintiffs complaint because he filed his federal complaint before allowing the administrative process to be completed."). To exhaust administrative remedies, prisoners commonly file grievances. Under the policy, in place at the time of this incident, a prisoner may grieve "alleged violations of policy and procedure, unsatisfactory conditions of confinement, official acts, or denial of rights which directly affect [prisoners]." MICH. DEP'T OF CORR., Policy Directive 03.02.130, ¶ B (effective June 5, 1995).

There are several steps to the grievance process. First, the grievant must attempt to verbally resolve the issue within two days after becoming aware that a grievable issue exists. Policy Directive 03.02.130, ¶ Z. If the issue is not resolved, within five days after the discussion, the prisoner may prepare a written grievance and submit it to the Step I grievance coordinator. Id. At Step I, a prison staff member is responsible for responding to a grievance within fifteen days, plus an additional fifteen days if an extension is granted by the Step I grievance coordinator. Id. ¶ CC. After the prisoner receives the response, the prisoner must request an appeal form within five days, and the prisoner must appeal to Step II within five days from receipt of the appeal form. Id. ¶ HH. At Step II, the grievance coordinator assigns an appropriate respondent, who is responsible for responding to a grievance within fifteen days, plus an additional fifteen days if an extension is granted by the Step II grievance coordinator. Id. ¶¶ II, JJ. Within ten days of receiving a Step II response, a prisoner must appeal to Step III.

Id. ¶ KK. At Step III, the Director of the Department of Corrections (or his designee) is responsible for responding. Id. ¶ KK. Policy requires that no more than ninety calendar days may elapse from the filing of the Step I grievance to the Step III response. Id. ¶¶ AA.

Plaintiff has now satisfied his burden of exhausting his administrative remedies. Plaintiff has attached copies of his grievances and responses at each level to his response to defendant's motion for summary judgment. The fact that plaintiff exhausted his remedies after he filed this lawsuit is of no consequence at this time. The prison has been given a full and fair opportunity to resolve this issue and the underlying purpose of the exhaustion doctrine has been satisfied. The exhaustion requirement was not intended to be a procedural trap for prisoners. It is simply a mechanism to allow the plaintiff prisoner and the defendants to resolve the matter prior to the filing of a lawsuit.

Defendants alternatively move for summary judgment on the merits of plaintiff's retaliation claim. Summary judgment is appropriate only if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). If the movant carries the burden of showing there is an absence of evidence to support a claim or defense, then the party opposing the motion must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. Id. at 324-25. The nonmoving party cannot rest on its pleadings but must present "specific facts showing that there is a genuine issue for trial." Id. at 324 (quoting Fed. R. Civ. P. 56(e)). While the evidence must be viewed in the light most favorable to the nonmoving party, a mere scintilla of evidence in support of the nonmovant's position will be insufficient. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 251-52 (1986). Ultimately, the court must

determine whether there is sufficient "evidence on which the jury could reasonably find for the plaintiff." Id. at 252. See also Leahy v. Trans Jones Inc , 996 F.2d 136, 139 (6th Cir. 1993) (single affidavit, in presence of other evidence to the contrary, failed to present genuine issue of fact); cf. Moore Owen Thomas & Co. v. Coffey, 992 F.2d 1439, 1448 (6th Cir. 1993) (single affidavit concerning state of mind created factual issue).

As explained by the Sixth Circuit, in order to succeed on his retaliation claim, plaintiff must establish three elements: (1) that he was engaged in protected conduct, (2) that an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct, and (3) that the adverse action was motivated at least in part by the plaintiffs protected conduct. Shehee v. Lutrell, 199 F.3d 295, 300 (6th Cir. 1999); Thaddeus-X v. Blatter, 175 F.3d at 394. Once the plaintiff establishes that his protected conduct was a motivating factor behind any harm, the burden of production shifts to the defendant to establish that he would have taken the same action absent the protected activity. A simple denial of the allegations is not sufficient to meet this burden. Thaddeus-X, at 399. The conduct at issue in this case was plaintiff's use of the grievance system, which the Sixth Circuit has recognized as protected conduct. Shehee, 199 F.3d at 300.

The Sixth Circuit stated that plaintiff clearly stated a claim for retaliation. Further, it appears that the Sixth Circuit is satisfied that plaintiff alleged facts that, if true, establish a claim of retaliation. The Sixth Circuit stated that plaintiff alleged facts sufficient to assert a viable retaliation claim. Plaintiff had filed grievances against prison officials, which is protected conduct under the First Amendment. The Sixth Circuit stated that an intra-prison prosecution may constitute an adverse action that would deter a person of ordinary firmness from engaging in the protected conduct at issue.

There is no question that plaintiff has established that he engaged in protected conduct by filing a grievance and complaining to the State Police. Defendants assert that plaintiff is unable to establish and support the other two elements necessary to withstand a summary judgment motion. Although the Sixth Circuit stated that an intra-prison prosecution may constitute an adverse action that would deter a person of ordinary firmness from engaging in the protected conduct at issue, in this case plaintiff cannot rebut defendants' motion for summary judgment. The issuance of the misconduct ticket against plaintiff had no adverse effect on the plaintiff. Plaintiff was not moved to more restricted housing, he was already in administrative segregation and no further restrictions were imposed on the plaintiff. Plaintiff was given a hearing on the charge and after he presented evidence the charge was dismissed. Under these facts, the filing of a misconduct ticket would not, in the opinion of the undersigned, deter a person of ordinary firmness from continuing to engage in filing of grievances or making complaints to the State Police.

Further, while it is true that plaintiff received the misconduct ticket because he complained that a prison staff member was improperly taking money out of his prison account, the misconduct ticket was issued only after an investigation was conducted and it was determined that plaintiff's claim was devoid of merit. The memorandum from Richard Johnson explains the reason that the misconduct ticket was issued. Mr. Johnson felt that prisoners should be entitled to file legitimate complaints, but that prisoners should be punished for filing false complaints. The investigation revealed that plaintiff's complaint was false. As a result, Mr. Johnson ordered defendants to file the misconduct ticket for interference with the administration of rules. The record fails to show that the issuance of the misconduct ticket was simply because prisoner Brown filed a grievance or complaint with the State Police. Plaintiff was issued a misconduct ticket solely

because it was determined that he filed a false grievance and false complaint with the State Police. It is perfectly reasonable under these circumstances for defendants to believe that plaintiff intentionally filed false complaints. A simple investigation of the facts, facts which should have been known by the plaintiff, revealed that plaintiff's complaint lacked merit.

In Williams v Smith, 717 F. Supp. 523 (W.D. Mich. 1989) (a pre-Thaddeus-X case applying the shocks the conscience test to plaintiffs retaliation claim), this court dismissed a similar claim of retaliation. In that case, the defendant wrote a misconduct charge against plaintiff asserting that a grievance plaintiff had recently written against him was frivolous and amounted to interference with the administration of prison rules. A hearing was held on the misconduct charge, and plaintiff was found not guilty. Plaintiff alleged the misconduct charge was retaliatory, and a violation of his substantive due process rights. In concluding that no rational trier of fact could find a violation of substantive due process under these facts, the court noted that the defendant was acting within his duty to ensure that the prison ran as efficiently as possible and that rules and procedures were followed.

Similarly, the record establishes that defendants acted in good faith. Plaintiff's claims were investigated. Plaintiff was cited with the misconduct violation only after the investigation

revealed that his complaints lacked any merit. Similar to the prison guard in Williams, defendants were acting within their duty to ensure efficient use of prison resources, and that prison rules and procedures were followed. Where a prisoner files a false grievance and false complaint, and a simple investigation reveals that the prisoner's claim lacks merit, it is not improper, in the opinion of the undersigned, to discipline the prisoner for making a false claim. Moreover, where the facts that a claim is false is within the knowledge of the prisoner, as it should have been in this case, the issuance of a misconduct ticket is justified for the false claim. The simple fact that the misconduct ticket was dismissed after a hearing, because the hearing officer determined that plaintiff legitimately believed his claim had merit when he made the complaints, does not entitle the plaintiff to relief. Accordingly, because no genuine issue of material fact exists to support plaintiffs retaliation claim, it is recommended that defendants' motion for summary judgment (Docket #104) be granted and this case be dismissed in its entirety. It is further recommended that plaintiff's motion to amend his complaint (Docket #102) be denied as moot.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten days of your receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR. 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal of those issues or claims addressed or resolved as a result of the Report and Recommendation. United States v. Walters, 638 F.2d 947 (6th Cir. 1981). See also Thomas v. Arn, 474 U.S. 140 (1985).

Dated: March 12, 2001

TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE